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JUL 14 2014

SC Court of Appeals

IN THE STATE OF SOUTH CAROLINA

In the South Carolina Court of Appeals

APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas

J. Derham Cole, Circuit Court Judge

Case No. 2011-CP-42-02965
Appellate Case No. 2013-000923

72849

Progressive Northern Insurance Company Appellant,

v.

Stanley K. Medlock, Corey K. Medlock and The Standard
Fire Insurance Company, Defendants,

Of Whom

Stanley K. Medlock and Corey K. Medlock..... Respondents.

**PETITION FOR REHEARING AND/OR REHEARING *EN BANC* WITH
SUPPORTING MEMORANDUM**

Appellant Progressive Northern Insurance Company, hereinafter, "Progressive", through its undersigned attorneys, hereby respectfully petitions the Court for rehearing or for a rehearing *en banc* pursuant to Rules 221(a) and 219(a), SCACR, based on points overlooked or misapprehended by this Court. The basis for the petition is as follows:

In its Unpublished Opinion No. 2014-UP-270, this Court affirmed the trial court's order granting summary judgment in favor of Respondents Stanley and Corey Medlock

determining that Progressive was required to make a new offer of optional coverage when Respondents added a second vehicle to, and changed Corey Medlock from a listed driver to a second named insured in, an existing policy of insurance. The parties do not dispute that Progressive made a meaningful offer of optional underinsured motorist coverage to Stanley Medlock when he initially purchased the policy and that Stanley signed a valid rejection of optional coverage. The parties also agree that Stanley was a named insured under the policy at the time that he signed the written rejection of coverage, and that Stanley remained a named insured at the time his son's status in the policy was changed to a second named insured and at the time of the accident.

This Court relied upon the Court of Appeals' previous holding in McDonald v. S.C. Farm Bureau Ins. Co., 336 S.C. 120, 518 S.E.2d 624 (Ct. App. 1999), wherein the court stated that insurers must "afford all named insured the opportunity to accept or reject UIM coverage." Id. at 124, 518 S.E.2d at 626. Respectfully, this language in McDonald was not necessary to that court's holding and is *dicta*. Moreover, it is inconsistent with the plain language of South Carolina Code § 38-77-350, which only requires an "applicant" to accept or reject UIM coverage and states that an applicant's signed rejection of optional coverage is binding upon all other insureds to the policy. See S.C. Code § 38-77-350(B).

This Court's unpublished decision does not address the fact that the General Assembly used two different terms in § 38-77-350. The General Assembly treats the terms "applicant" and "named insured" differently in § 38-77-350. Requiring "all named insureds" to reject optional coverage ignores the General Assembly's use of the two distinct terms, "applicants" and "named insured," in § 38-77-350. The Court must

presume that the General Assembly intended different meanings for these two distinct terms. See Abbott v. Abbott, 560 U.S. 1, 130 S. Ct. 1983 (2010) (dissent) (citing Rusello v. United States, 464 U.S. 16, 22-23, 104 S. Ct. 296, 300 (1983)) (“In interpreting statutory text, [courts] ordinarily presume that the use of different words is purposeful and evinces an intention to convey a different meaning.”); Gordon v. Phillips Utils., Inc., 362 S.C. 403, 406, 608 S.E.2d 425, 427 (2005) (“[T]he legislature intends to accomplish something by its choice of words, and would not do a futile thing.”). Under this Court’s holding in the instant unpublished opinion, however, the General Assembly’s use of two distinct terms is futile and rendered meaningless because the Court treats the two phrases as one and the same.

This Court’s holding also fails to address the meaning of the word “change” in South Carolina Code § 38-77-350(C). The South Carolina Supreme Court has never addressed what constitutes a “change” to an existing policy. However, the General Assembly used broad language in § 38-77-350(C), stating that “[a]n automobile insurer is not required to make a new offer of coverage on any automobile policy which renews, extends, changes, supersedes, or replaces an existing policy.” S.C. Code § 38-77-350(C). Rather than purchase his own separate policy after he purchased a motorcycle, under which separate policy he would not have enjoyed a multi-vehicle premium discount, Corey’s status under the existing Progressive policy was merely changed from that of listed household driver to that of second named insured along with his father, Stanley. Before and after this status change for Corey, Stanley remained a named insured on the policy.

In addressing whether Corey's change in status to a second named insured constitutes a "change" requiring a new offer, this Court cites its previous holding from Ackerman v. Travelers Indem. Co., 318 S.C. 137, 142, 457 S.E.2d 408, 410 (Ct. App. 1995) that, "[w]here [s]ection 38-77-350(C) states the insured is not required to make a new offer, it clearly envisions the circumstances where the insurer has already made an old offer." However, the unpublished opinion does not explain why the prior undisputed valid offer and rejection by Stanley – who remained a named insured on the policy – did not likewise constitute an old offer.

This Court's application of McDonald to these facts creates manifest uncertainty for insurers as to when a new offer of optional coverage is required and runs contrary to the safe harbor provisions set forth in § 38-77-350. In Smith v. South Carolina Ins. Co., 350 S.C. 82, 564 S.E.2d 358 (Ct. App. 2002), the court held that the addition of a second vehicle to an existing policy did not create a new policy of insurance, but merely changed the policy. The disparate holdings create a substantial gap in appellate decisions as to what constitutes a "change" under the statute. Holding that an optional coverage rejection from Stanley Medlock that bound Corey Medlock as a household insured before he was later changed to a second named insured will no longer bind him after the mere status change, even though Stanley remained a named insured on the policy, creates an inequitable and confusing result and defeats the General Assembly's intent in § 38-77-350(B) through (D).

Because of the significant impact of this decision, as well as and most especially the confusion and uncertainty the decision will inject into the marketplace for Progressive

and other insurers in South Carolina, and for the above-stated reasons and authorities,
Appellant Progressive petitions this Court for rehearing or rehearing *en banc*.

Respectfully submitted,

MURPHY & GRANTLAND, P.A.

A handwritten signature in black ink, appearing to be 'JRM', written over a horizontal line.

J.R. Murphy, Esquire

S.C. Bar No. 7941

Wesley B. Sawyer, Esquire

S.C. Bar No. 100229

Murphy & Grantland, P.A.

P.O. Box 6648

Columbia, SC 29260

(803) 782-4100

Attorneys for Appellant

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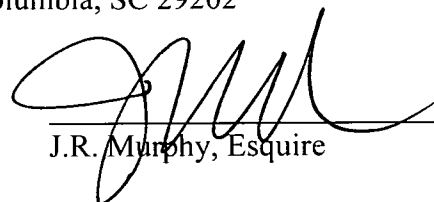
Stanley K. Medlock and Corey K. Medlock..... Respondents.

PROOF OF SERVICE

I certify that I have served the Petition for Rehearing and/or Rehearing *en banc* with Supporting Memorandum on Stanley K. Medlock, Corey K. Medlock and the Standard Fire Insurance Company by depositing a copy of it in the United States Mail, postage prepaid, on July 14, 2014, addressed to their attorneys of record:

Brian A. Martin, Esquire
Martin & Davis, LLC
212 Trade Street
Greer, SC 29651

William P. Davis, Esquire
Baker, Ravenel & Bender, LLP
3710 Landmark Drive, Suite 400 (29204)
P.O. Box 8057
Columbia, SC 29202



J.R. Murphy, Esquire

Wesley B. Sawyer, Esquire
Murphy & Grantland, P.A.
P.O. Box 6648
Columbia, SC 29260
(803) 782-4100
Attorney for Appellant



MURPHY & GRANTLAND, P.A.

J. R. Murphy
Direct dial 803-454-1231
jrmurphy@murphygrantland.com

July 14, 2014

HAND DELIVERED

Jenny A. Kitchings
South Carolina Court of Appeals
1205 Pendleton St.
P.O. Box 11629
Columbia, SC 29211

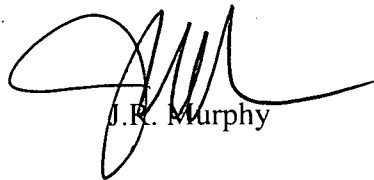
Re: Progressive Northern Insurance Company vs. Stanley K. Medlock, Corey K. Medlock and The Standard Fire Ins. Co.
Civil Action No.: 2011-CP-42-02965
Appellate Case No.: 2013-000923
Claim No.: 10-5041541
Date of Loss: 10/09/10
Our File No.: 1115-2016

Dear Ms. Kitchings:

Enclosed please find herewith for filing with the Court the original and ten (10) copies of a Petition for Rehearing and/or Rehearing *en banc* with Supporting Memorandum in the above-referenced matter. I would appreciate your filing the original and returning the clocked copies to me by individual delivering same. Also enclosed please find my firm's check in the amount of \$25.00 for filing same. By copy of this letter I am serving same on opposing counsel.

With warm personal regards, I am

Sincerely yours,



J.R. Murphy

JRM/sb
Enclosures

cc: Brian A. Martin, Esquire
William P. Davis, Esquire
Michael T. Coulter, Esquire
James A. Dodrill, Esquire

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Telephone 803-782-4100 • Facsimile 803-782-414
4406-B Forest Drive, Columbia, South Carolina 29206 • Post Office Box 6648, Columbia, South Carolina 29260